U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0188 BLA

ROBY LOWE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 6/29/2023
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2020-BLA-06001) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on July 8, 2019.

The ALJ accepted the parties' stipulation that Claimant has 29.71 years of coal mine employment and simple clinical pneumoconiosis as consistent with the evidence of record. She found Claimant established complicated pneumoconiosis and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of

the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. She further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer argues the ALJ erred in finding Claimant established complicated pneumoconiosis.[1] Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

The ALJ found the x-ray evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 5-8. She found the computed tomography scan evidence, medical opinions, and Claimant's treatment records do not support a finding of complicated pneumoconiosis considered individually, but also do not weigh against

[1] We affirm, as unchallenged on appeal, the ALJ's finding Claimant's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14-15.

[2] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Hearing Transcript at 20.

finding complicated pneumoconiosis based on the x-rays.[3] 20 C.F.R. §718.304(c); Decision and Order at 9-10, 13-14. Weighing all the evidence together, she concluded the preponderance of the evidence establishes complicated pneumoconiosis. Decision and Order at 14.

Employer argues the ALJ erred in finding the x-rays establish complicated pneumoconiosis. Employer's Brief at 3-7. We disagree.

The ALJ considered nine readings of four x-rays taken April 24, 2019, September 30, 2019, March 3, 2021, and April 27, 2021.[4] Decision and Order at 5-8. She noted that each of the interpreting physicians are dually-qualified B readers and Board-certified radiologists with the exception of Dr. Forehand, who is just a B reader. *Id.* at 7.

Dr. DePonte read the April 24, 2019 x-ray as positive for simple and complicated pneumoconiosis, category A, while Dr. Tarver read it as negative for both diseases. Director's Exhibits 16, 21. Drs. Forehand and Crum read the September 30, 2019 x-ray as positive for simple and complicated pneumoconiosis, category A. Director's Exhibits 12 at 7, 16 at 3. Dr. Adcock read it as negative for both diseases. Director's Exhibit 20 at 33. Dr. DePonte read the March 3, 2021 and April 27, 2021 x-rays as positive for simple and complicated pneumoconiosis, category A, while Dr. Tarver read them both as positive for simple pneumoconiosis and indicated "CWP" on the International Labour Organization (ILO) x-ray forms, but he did not indicate any large opacities consistent with complicated pneumoconiosis. Claimant's Exhibits 1, 2; Employer's Exhibits 2, 3 at 27.

Employer argues the ALJ erred in finding the September 30, 2019 x-ray positive for complicated pneumoconiosis. Employer's Brief at 3-7. Specifically, Employer contends the ALJ erred by "counting heads" and finding the x-ray positive for complicated pneumoconiosis solely because two physicians read it as positive for the disease, while only one physician read it as negative. Employer's Brief at 7, *citing Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016). Employer's argument is not persuasive.

Contrary to Employer's argument, the ALJ noted that Dr. Adcock's reading was one of only two x-ray readings interpreted as negative for simple pneumoconiosis. Decision and Order at 7. The ALJ then found Dr. Adcock's failure to identify simple pneumoconiosis in the September 30, 2019 x-ray, a disease the existence of which Employer had stipulated to, undermined his reading of the x-ray as negative for

[3] The record contains no biopsy evidence. 20 C.F.R. §718.304(b).

[4] The record also contains Dr. Gaziano's reading of the September 30, 2019 x-ray for quality purposes only. Director's Exhibit 14.

complicated pneumoconiosis as well.[5] *See Cox*, 602 F.3d at 283; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Hearing Transcript at 18; Decision and Order at 7. Thus, the ALJ properly performed both a qualitative and quantitative analysis of the conflicting x-ray readings and explained her basis for resolving the conflict in the evidence. *See Addison*, 831 F.3d at 256; *Hicks*, 139 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 7.

Because it is supported by substantial evidence, we affirm the ALJ's conclusion that the September 30, 2019 x-ray is positive for complicated pneumoconiosis, as well as her finding that the x-ray evidence establishes complicated pneumoconiosis. 20 C.F.R. §718.304(a). As Employer raises no further arguments on appeal, we affirm the ALJ's finding the evidence as a whole establishes complicated pneumoconiosis, and therefore the award of benefits.

[5] Employer argues that the ALJ's failure to apply the same analysis to Dr. Adcock's negative interpretation of the April 24, 2019 x-ray indicates that she did not actually consider Dr. Adcock's negative reading for simple pneumoconiosis as a basis for her weighing of all of the interpretations of this x-ray. However, we are not persuaded such a conclusion is compelled, particularly as the ALJ specifically considered Dr. Adcock's negative reading when weighing these interpretations. Employer's Brief at 6-7. Further, as Employer concedes, applying this analysis to the April 24, 2019 x-ray interpretations would support finding the x-ray positive for complicated pneumoconiosis overall, and thus lend additional support to the ALJ's finding the x-ray evidence establishes complicated pneumoconiosis. Thus, Employer has not explained how the "error to which [it] points could [make] any difference." *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We note that Employer does not argue that the ALJ's consideration of a negative reading for simple pneumoconiosis as a factor when weighing the physicians' interpretations regarding the existence of complicated pneumoconiosis was, or would be, impermissible.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge